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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

DATABASE SERVICE MANAGEMENT, INC.

DOCKET FILE COPY ORIGINAL

CC DOCKET: 95-15

v.

BEEHIVE TELEPHONE COMPANY, INC.

Primary Jurisdiction Referral from the United States  
District Court for the District of Utah, Central Division

To: The Commission

**PETITION FOR DECLARATORY RULING**

Beehive Telephone Company, Inc. ("Beehive"), by its attorney, and pursuant to section 1.2 of the Commission's Rules, and an order of the United States District Court for the District of Utah, Central Division ("District Court"), *see infra* Attachment 1 at 3-5, hereby petitions the Commission to issue a declaratory ruling on the matters presented by counts 1 through 7 of Beehive's amended counterclaim in *Database Serv. Management, Inc. v. Beehive Tel. Co., Inc.*, Civ. No. 2:96-CV-188J (C.D. Utah filed Mar. 1, 1996). *See infra* Attachment 2 at 5-25.

**BACKGROUND**

The District Court action was brought by Database Service Management, Inc. ("DSMI") to collect charges from Beehive that were allegedly due for access to the 800 Service Management System ("SMS") under the terms of the Bell Operating Companies' 800 Service Management System (SMS/800) Functions Tariff ("SMS Tariff"). In defense of that action, Beehive challenged the lawfulness of the SMS Tariff, *see infra* Attachment 2 at 3-5, on grounds that the Commission

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largely rejected in *Beehive Tel., Inc. v. The Bell Operating Cos.*, 12 FCC Rcd 17930 (1997), *petition for review pending*, *Beehive Tel. Co., Inc. v. FCC*, No. 97-1662 (D.C. Cir. filed Oct. 31, 1997) (adopting and reaffirming *Beehive Tel., Inc. v. The Bell Operating Cos.*, 10 FCC Rcd 10562 (1995)). In addition, Beehive counterclaimed alleging violations of sections 201, 202, 251, and 252 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 202, 251, 252, and the Due Process Clause of the Fifth Amendment. *See infra* Attachment 2 at 16-23.

DSMI asked the District Court to dismiss Beehive's counterclaim, or in the alternative, to refer Beehive's statutory claims to the Commission under the doctrine of primary jurisdiction. *See infra* Attachment 3. After responsive papers were filed, *see infra* Attachments 4 and 5, the District Court dismissed counts 1 through 5 without prejudice to their assertion before the Commission, and held that counts 6 and 7 need not be adjudicated. *See infra* Attachment 6. DSMI appealed to the United States Court of Appeals for the Tenth Circuit, which remanded the case to the District Court with directions to refer Beehive's counterclaim to the Commission, but otherwise denied the relief sought by DSMI on appeal. *See infra* Attachment 7 at 16. The District Court issued its referral order on January 20, 1999, while retaining its jurisdiction over the dispute.

### DISCUSSION

The Commission has the discretion to issue a declaratory ruling to terminate a controversy or remove uncertainty. *See* 47 C.F.R. § 1.2; 5 U.S.C. § 554(e); *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1304 (D.C. Cir. 1997). And it has exercised that discretion in response to a federal court referral under the doctrine of primary jurisdiction. *See, e.g., WATS Int'l Corp. v. Group Long Distance (USA), Inc.*, 11 FCC Rcd 3720 (Com. Car. Bur. 1995), *aff'd*, 12 FCC Rcd 1743 (1997).

It can do so again here.

Obviously, there is a substantial, actual controversy between Beehive and DSMI in the District Court. It is equally obvious that the controversy has “sufficiently crystallized” to warrant consideration in the context of a declaratory ruling. *Omnipoint Communications, Inc.*, 11 FCC Rcd 10785, 10788 (1996). Certainly, the issues presented are ripe for consideration.

Beehive has long maintained that the SMS Tariff should not have survived the enactment of the Telecommunications Act of 1996 (“1996 Act”). *See Petition for Forbearance From Application of the Act to Previously Authorized Services*, 12 FCC Rcd 8408, 8411 (Com. Car. Bur. 1997). It argued that point in seeking reconsideration of the Commission’s refusal to implement section 251 of the 1996 Act both with respect to the provision of access to the SMS database and to the administration of toll free numbers. *See Petition for Reconsideration*, CC Docket No. 96-98, at 9-12 (Sept. 30, 1996) (“Petition”). The Commission has yet to decide that issue, despite its representation to a federal appeals court in July 1997 that an order disposing of the Petition had been drafted and would be presented to the commissioners by the end of that year. *See Opposition of the FCC to Petition for Writ of Mandamus* at 11-12, *In re Beehive Tel. Co.*, No. 97-1374 (D.C. Cir. filed July 21, 1997). Timely action on the Petition could have obviated the need for the District Court’s referral order.

The positions of both parties on the issues are set forth in Attachments 2-5 hereto. *See also* Brief for Petitioners at 32-38, *Beehive Tel. Co., Inc. v. FCC*, No. 97-1662 (D.C. Cir. filed Aug. 26, 1998). Of course, Beehive will provide the Commission with whatever additional information is deemed necessary to adjudicate the issues. And it would be happy to attend a conference with the

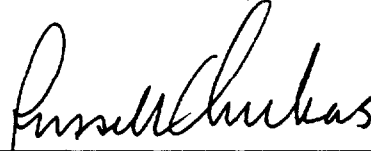
staff to discuss substantive and procedural issues. Such conferences have been held in past cases such as this. *See WATS*, 11 FCC Rcd at 3721.

For all the foregoing reasons, Beehive respectfully requests the Commission to issue a declaratory ruling with respect to the seven counts set forth in Beehive's amended counterclaim attached hereto.

Respectfully submitted,

BEEHIVE TELEPHONE COMPANY, INC.  
BEEHIVE TELEPHONE, INC. NEVADA

By



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January 29, 1999



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

FILED  
21 JUNE 1996  
DISTRICT CLERK  
BY: Horn

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|                                |   |                        |
|--------------------------------|---|------------------------|
| DATABASE SERVICE               | ) |                        |
| MANAGEMENT, INC., a New Jersey | ) |                        |
| corporation,                   | ) | Civil No. 2:96-CV-188J |
|                                | ) |                        |
| Plaintiff,                     | ) |                        |
|                                | ) | <b>ORDER</b>           |
| vs.                            | ) |                        |
|                                | ) |                        |
| BEEHIVE TELEPHONE COMPANY,     | ) |                        |
|                                | ) |                        |
| Defendant.                     | ) |                        |

\*\*\*\*\*

The plaintiff, Database Service Management, Inc. ("DSMI"), commenced the instant action against Beehive Telephone Company, Inc. ("Beehive") on March 1, 1996. On June 6-7, 1996, Beehive answered, counterclaimed, and filed a Motion for Temporary Restraining Order and Preliminary Injunction, which was heard by this court on June 13, 1996. At that time, the court ordered that DSMI restore service to Beehive on 56 toll-free telephone numbers which had been disconnected beginning May 29, 1996, and that DSMI hold up to 10,000 additional toll-free "800" numbers pending further order of the court.<sup>1</sup>

The parties filed additional motions concerning the counterclaim and its amendment, and the court conducted a series of status conferences concerning this matter, both in an effort to resolve the form of written order embodying the preliminary relief granted in June 1996, and to determine what issues remained to be decided.

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<sup>1</sup> The numbers in question apparently have the prefix "629" (i.e., 800-629-xxxx), and are referred to by the court of appeals as "629" numbers.

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On March 2, 1998, the court held another status conference in this case. After discussion with counsel, the Court concluded that no issues remained that are appropriate for adjudication in this forum. DSMI's claim for payment had been satisfied by the payment actually made, and additional issues raised by Beehive's amended counterclaim seemed more appropriately determined by the Federal Communications Commission.

On July 13, 1998, the court filed and entered two orders: (1) FINDINGS, CONCLUSIONS AND PRELIMINARY INJUNCTION (dkt. no. 72), memorializing this court's prior bench rulings; and (2) a final ORDER (dkt. no. 73) dismissing plaintiff's complaint with prejudice, and dismissing counts 1 through 5 of the amended counterclaim without prejudice to their assertion before the Federal Communications Commission, permitting either defendant or plaintiff to renew those aspects of the controversy if such renewal was desired. This court's final Order also ordered that DSMI restore to Beehive nearly 10,000 toll-free "800" telephone numbers which were the subject of this proceeding to the defendant Beehive and which had not previously been restored to Beehive by DSMI.<sup>2</sup>

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<sup>2</sup> There appears to be some confusion at the court of appeals concerning the July 13, 1998 Orders. The first order entered, FINDINGS, CONCLUSIONS, AND PRELIMINARY INJUNCTION, reflected this court's prior ruling that DSMI "hold the balance of the Numbers which it repossessed from Beehive until further order of this Court," and the second Order directed that DSMI "restore to defendant Beehive the use of all of those telephone numbers earlier allocated to Beehive," i.e., the balance of the 10,000 "800" numbers at issue herein. However, at page 6 of the court of appeals' Revised Order, it is recounted that "[t]hree days after entry of" the order restoring the balance of the 10,000 numbers to Beehive, "the district court entered a separate order directing DSMI to . . . hold the balance of the ["929"] [n]umbers which it repossessed from Beehive until further order of this Court . . . ." The court of appeals comments in footnote 3 that "[t]hese two orders can reasonably be read as inconsistent."

Reviewing the docket and the file in this case, it appears that the court of appeals may have things backwards. Early on, this court directed DSMI to hold the balance of the 10,000 numbers in "unavailable" status pending further order of the court. It took no small effort on the part of court and counsel to arrive at an acceptable form of written order embodying that ruling, and the July 13 PRELIMINARY INJUNCTION was signed and entered for that purpose *nunc pro nunc* to April 21, 1997. The final Order, also entered by this court on July 13, constituted a "further order of this Court" directing DSMI to restore the numbers to Beehive. These orders do not coexist in continuing conflict; the final order superseded the terms of the preliminary injunction. Perhaps that is why "[b]oth parties apparently read the orders as requiring the restoration of all '629' numbers to Beehive," as the court of appeals suggests. The only document filed "three days later" in this case was DSMI's notice of appeal (dkt. no. 74) from the preliminary injunction.

DSMI sought a stay of the July 13, 1998 Order, appearing before the court on July 31 and August 10, 1998. The court denied DSMI's motion for stay, but directed that Beehive notify the court and DSMI of any prospect of using additional "800" numbers and that Beehive not make any disposition of any additional "800" numbers from the 10,000-number block absent further order of the court.

By an amended notice of appeal filed July 17, 1998 (dkt. no. 75), DSMI appealed both if this court's July 13, 1998 Orders to the United States Court of Appeals for the Tenth Circuit. On November 24, 1998, the court of appeals entered an order denying DSMI's motion to suspend this court's prior order, dismissing DSMI's appeal, and remanding the matter to this court for modification of the July 13, 1998 Order and referral of the matter to the FCC under the doctrine of primary jurisdiction. *Database Service Management, Inc. v. Beehive Telephone Company*, No. 98-4117 (10th Cir. November 24, 1998) (Order and Mandate). On January 6, 1999, the court of appeals entered a Revised Order, which was received on January 12, 1999, as a supplement to the mandate of the court of appeals. *Database Service Management, Inc. v. Beehive Telephone Company*, No. 98-4117 (10th Cir. November 24, 1998), incorporating essentially the same directions.

Based upon the Revised Order of the court of appeals, and pursuant to the mandate thereof,

**IT IS ORDERED** that the matters addressed by counts 1 through 7 of the amended counterclaim of Beehive Telephone in this proceeding are hereby referred to the Federal Communications Commission (FCC) for hearing and determination;

**IT IS FURTHER ORDERED** that paragraph 2 of this court's July 13, 1998 Order (dkt.



no. 73) is VACATED and further proceedings before this court on claims asserted in the amended counterclaim are hereby STAYED pending the outcome of proceedings before the Federal Communications Commission; and

**IT IS FURTHER ORDERED** that Paragraph 3 of this court's July 13, 1998 Order (dkt. no. 73) is amended to read as follows:

3. Excepting the numbers which were embraced in the earlier directive of the Court, and which already have been restored to defendant Beehive, ~~plaintiff DSMI forthwith shall restore all telephone numbers which are the subject of this proceeding to the defendant Beehive~~ all "629" numbers of the 10,000 not currently in use by Beehive or other RespOrgs are to be placed by DSMI in "unavailable" status pending FCC resolution of the matters referred to it by the district court, provided, however, that Beehive shall be allowed to obtain a "629" number from the "unavailable" block when necessary to provide service to a new Beehive customer or additional service to an existing Beehive customer.<sup>5</sup> Additionally, any current holder of a "629" number shall, in accordance with the SMS/800 Tariff, be allowed to voluntarily transfer RespOrg status from Beehive to another RespOrg.


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<sup>5</sup> Plaintiff DSMI and defendant Beehive should cooperate with each other to the end that ~~this restoration of numbers may occur as expeditiously as possible, so that the~~ such additional numbers may be put into service, becoming useable by defendant Beehive, as quickly as practicable.

Counsel shall forthwith make such arrangements as are necessary to facilitate the transfer of the matter to the Federal Communications Commission as directed herein.

DATED this 20 day of January, 1999.

BY THE COURT:



BRUCE S. JENKINS  
United States Senior District Judge



**Judge Bruce S. Jenkins**

Defendant Beehive Telephone Company, Inc. ("Beehive"), through its undersigned counsel, answers the complaint of the Plaintiff, Database Management Services, Inc. ("Plaintiff" or "DSMI"), as follows.

1. Admits the allegations of paragraph 1.

2. Admits the allegations of paragraph 2.

3. Admits the allegations of paragraph 3.

4. Admits the allegations of paragraph 4.

5. Admits that the Bell Operating Companies ("BOCs"), on behalf of Bell Communications Research, Inc. ("Bellcore") and Plaintiff, filed what was styled as a certain tariff with the Federal Communications Commission ("FCC"), which tariff is known as the 800 Management System (SMS) Functions Tariff No. 1 ("SMS/800 Tariff"), but denies that such tariff is lawful, or that it was lawfully filed, and further denies that the Communications Act of 1934, 47 U.S.C. sections 151, et seq., authorizes the BOCs to file such a tariff inasmuch as they do not act jointly as a "common carrier" under the Communications Act, and the service provided pursuant to the SMS/800 Tariff is not a "communications service" or "common carriage" as defined by the statute.

6. Admits the allegations of paragraph 6.

7. Admits the allegation in paragraph 7 that Plaintiff is an agent for the BOCs through their wholly-owned subsidiary, Bellcore.

8. Admits the allegations of paragraph 8.

9. Denies the allegations of paragraph 9 to the extent they imply that Beehive voluntarily "subscribed" to any services offered by Plaintiff.

10. Admits that Plaintiff has billed Beehive for various amounts as alleged in paragraph 10, but denies that Beehive voluntarily subscribed to Plaintiff for any services, denies that Beehive sought or needed any of Plaintiff's services, and further denies that Beehive has any lawful obligation to pay Plaintiff under its SMS/800 Tariff.

11. Admits that Plaintiff has billed to Beehive the amounts stated in paragraph 11, but denies that such amounts represent any lawful obligation of Beehive under the SMS/800 Tariff.

12. Admits the allegations of paragraph 12.

13. Admits that Beehive has refused to pay the amounts to Plaintiff which are the subject of the instant complaint under the SMS/800 Tariff, as alleged in paragraph 13, based upon a good-faith belief that the SMS/800 Tariff is unlawful and unreasonable.

14. Denies that Plaintiff is entitled to interest, as alleged in paragraph 14, on any amount billed to Beehive under an unlawful and unreasonable tariff.

15. Denies the allegations of paragraph 15, and further denies that Plaintiff is entitled to any prejudgment or postjudgment interest, or to its attorneys' fees.

#### AFFIRMATIVE DEFENSES

16. The Plaintiff has failed to state a claim upon which relief may be lawfully granted.

17. The Plaintiff seeks to recover amounts billed under a tariff which the FCC had no lawful authority to accept. Beehive's claims of tariff unlawfulness include, but are not limited to, the following:

a. The FCC lacks jurisdiction under the Communications Act to treat access to the 800 Service Management System ("SMS/800") as a communications common carrier offering subject to regulation under Title II of the Act.

b. The FCC could not lawfully allow a schedule of charges for SMS/800 access to be filed under section 203(a) of the Act, inasmuch as the schedule did not and does not show any charges for the issuing carriers for services between different points on their own (or any) system.

c. The FCC unlawfully held that SMS/800 access can be offered under both a tariff and private contracts without making an unreasonable discrimination in violation of section 202(a) of the Act, if such services are common carriage insofar as they are incidental to the same (800 transmission service) common carrier service.

d. The tariffed rates for SMS/800 services were and are unjust and unreasonable, in violation of section 201(b) of the Act, inasmuch as the rate charged by the issuing carriers were not related to their costs, but to the revenue requirements of DSMI, an unregulated entity.

18. Beehive's complaints of tariff unlawfulness are currently on appeal to the D. C. Circuit Court of Appeals in Case No. 95-1479. On April 5, 1996, the FCC filed a motion with the Circuit Court of Appeals requesting that the case be remanded for further

proceedings before the FCC. No ruling has yet issued on that request, and the case is set for oral argument on September 9, 1996, unless the Court remands.

19. On June 5, 1996, Beehive paid Plaintiff the sum of \$48,879.95, under protest, which is the amount, including interest, sought by Plaintiff in the complaint herein.

#### AMENDED COUNTERCLAIM

20. Wherever an allegation in this amended counterclaim is deemed to be inconsistent with an allegation in the answer or with an allegation elsewhere in the amended counterclaim, then such inconsistent allegation is intended as being pled in the alternative as permitted under the Federal Rules of Civil Procedure.

21. Beehive is a Utah corporation operating as a public utility certificated to provide telephone service within the state of Utah by the Utah Public Service Commission. Its principal place of business is in Salt Lake City. Beehive also is classified as a "carrier" for purposes of the FCC, and is a "local exchange carrier" ("LEC") under the federal Communications Act, 47 U.S.C. section 153. The Plaintiff in this action, DSMI, is a New Jersey corporation which has its principal place of business in New Jersey. DSMI is a wholly-owned subsidiary of Bellcore, which is a Delaware corporation that is wholly and jointly owned by the 7 BOCs, which are: Bell Atlantic Telephone Companies; BellSouth Telecommunications, Inc.; Southwestern Bell Telephone Company; the NYNEX Telephone Companies; Pacific Bell and Nevada Bell; and U.S. West Communications, Inc.

22. This amended counterclaim involves a claim or claims for service which DSMI refuses to provide to Beehive under a tariff filed with the FCC; accordingly, this amended



counterclaim arises under the laws of the United States, and this Court has subject matter jurisdiction of the amended counterclaim under 28 U.S.C. section 1331. This amended counterclaim involves a claim or claims concerning the legality and propriety of FCC action, inaction, interpretation, and administration under the 1934 Communications Act and the 1996 Telecommunications Act, as well as a tariff allegedly derived from the same; accordingly this amended counterclaim arises under the laws of the United States, and this Court has subject matter jurisdiction of the amended counterclaim under 28 U.S.C. section 1331. This amended counterclaim involves a claim or claims concerning the legality and propriety of DSMI action, inaction, interpretation, and administration under the 1934 Communications Act and the 1996 Telecommunications Act, as well as a tariff allegedly derived from the same; accordingly, this amended counterclaim arises under the laws of the United States, and this Court has subject matter jurisdiction of the amended counterclaim under 28 U.S.C. section 1331. This amended counterclaim involves a claim under the due process clause of the Fifth Amendment of the United States Constitution; accordingly, this Court has subject matter jurisdiction of this amended counterclaim under 28 U.S.C. section 1331. Beehive also invokes the provisions of the Federal Declaratory Judgments Act, to the extent application of this statute may be necessary or appropriate to complete relief in this action. Venue is proper in this district under 28 U.S.C. section 1391.

23. At all material times the BOCs, through Bellcore and DSMI, jointly offered for sale to the public a set of services provided by the SMS/800, under a tariff filed with the

FCC pursuant to its regulatory authority under the Communications Act and pursuant to an FCC ruling in an administrative proceeding known as the CompTel Declaratory Ruling, Provision of Access for 800 Service, 8 FCC Rcd. 1423 (1993).

24. The SMS/800 is a computer-based system that manages the assignment and use of "800" numbers (i.e. telephone numbers that can be dialed in the format 1-800-xxx-xxxx, with the toll charges being assessed to the called party).

25. As agent for the BOCs and Bellcore, DSMI administers the SMS/800 system pursuant to a contract between DSMI and the BOCs.

26. Beehive has been a Responsible Organization ("RespOrg"), as defined in the SMS/800 Tariff, and for this and other reasons was permitted to reserve "800" numbers, and otherwise to function as a RespOrg and holder of "800" numbers. Beehive was authorized to use a block of 10,000 "800" numbers, all beginning with the prefix "629." A Beehive customer using a Beehive-assigned "800" number would dial 1-800-629-xxxx for access to the network. However, long before the creation of "800" number portability by the BOCs, Beehive had its own version of "800" use and portability within its own bi-state area. Beehive specifically negotiated for and obtained the right to hold and use these 629 numbers. This right to hold and use these particular numbers was negotiated for and assigned to Beehive long before the advent of the SMS/800 Tariff. After Beehive obtained the right to hold and use these 629 numbers, it made investments and extended efforts in a variety of ways in order to create good will value in the 629 numbers. These investments and efforts included, among other things, the expenditure of funds, research

and development, computer programming, engineering effort, customer relations, building competitive marketing strategies, negotiation of contracts, work before governmental agencies, and the like. As a result of these investments and efforts, Beehive in fact has created substantial good will value respecting its portfolio of 629 numbers. The 629 prefix spells MAX and this likewise enhances the good will value of these particular numbers, and allows the potential for a marketing approach built around numbers which are easily remembered, or numbers with names, or so-called vanity numbers. The legal, social, and economic trend toward so-called number portability, as indicated in recent legislative and regulatory developments, further confirms the good will value of these particular 629 numbers.

27. Prior to the filing of the SMS/800 Tariff, Beehive was an active participant in industry-wide meetings sponsored by Bellcore to design the BOCs' "800" number portability system. In these pre-filing meetings, Beehive continually raised its concern about its need to protect its long-established 800-629-xxxx operating system. At all such meetings, the committee agreed that Beehive would incur no charges for listing its 10,000 629-xxxx numbers in the national database. On that assurance, Beehive withdrew its objection and loaded its 10,000 629-xxxx numbers on the SMS system. From the time that the BOCs and Bellcore issued the SMS/800 Tariff (and for the first time changed the position taken in the Bellcore committee meetings),<sup>1</sup> Beehive has objected to it as an unlawful tariff

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<sup>1</sup> The SMS/800 Tariff was issued March 5, 1993, with an effective date of May 1, 1993.

based upon, but not limited to, the following:

a. The FCC lacks jurisdiction under the Communications Act to treat access to SMS/800 as a communications common carrier offering services subject to regulation under Title II of the Act.

b. The FCC could not lawfully allow a schedule of charges for SMS access to be filed under section 203(a) of the Act, inasmuch as the schedule did not and does not show any charges for the issuing carriers for services between different points on their own (or any) system.

c. The FCC unlawfully held that SMS access can be offered under both a tariff and private contracts without making an unreasonable discrimination in violation of section 202(a) of the Act, if such services are common carriage insofar as they are incidental to the same (800 transmission service) common carrier service.

d. The tariffed rates for SMS services were and are unjust and unreasonable, in violation of section 201(b) of the Act, inasmuch as the rates charged by the issuing carriers were not related to their costs, but to the revenue requirements of DSMI, an unregulated entity.

28. In June 1992, Beehive filed a petition with the FCC requesting a one-year freeze on the conversion to the SMS/800 database system. Beehive had already developed its own database system, at substantial expense, for utilization of "800" numbers, and believed that it did not desire or require the SMS/800 services, and that the proposed rates and charges were unreasonable and exorbitant. The FCC denied that request in

January 1993.

29. On January 29, 1993, the FCC issued orders in its rulemaking proceeding which established rate structure and pricing rules for 800 database access services. The FCC refused to decide whether access to the SMS/800 was a common carrier service subject to tariffing.<sup>2</sup>

30. Ten days later, on February 10, 1993, the FCC issued a declaratory ruling that SMS/800 access to RespOrgs, such as Beehive, was a common carrier service. CompTel Declaratory Ruling, 8 FCC Rcd. at 1426. The FCC ruled that: (1) SMS/800 access to RespOrgs was a communications service because it was "incidental" to 800 database service; (2) the "better course" was to treat SMS/800 access as common carriage; (3) that SMS/800 access was a monopoly service that should be tariffed to prevent discrimination and unreasonable rates; and (4) that the BOCs or a BOC should file the SMS/800 tariff because, through Bellcore [and now DSMI] the BOCs "control" the SMS. CompTel Declaratory Ruling, 8 FCC Rcd. at 1426-27.

31. In March 1993, Beehive loaded its 10,000 "800" numbers into the SMS/800. Prior to doing so, Beehive was not informed by Bellcore that it would incur any obligation to pay charges for SMS/800 access, nor had it entered into a contract with any entity that obligated it to pay any charges resulting from the SMS/800 access.

32. The BOCs filed the SMS/800 Tariff on March 15, 1993. On April 28, 1993, responding to petitions filed by MCI and others to reject the SMS/800 Tariff, the FCC's

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<sup>2</sup> See Provision of Access for 800 Service, 8 FCC Rcd. at 909.

Common Carrier Bureau (the "Bureau") instituted an investigation, under section 204(a) of the Act, 47 U.S.C. section 204(a), to determine whether the underlying cost allocations, resulting rate levels, and terms of the SMS/800 Tariff were lawful. See Tariff Investigation I, 8 FCC Rcd. at 3243. The Bureau placed the burden of proof on the BOCs to show that they had "establish[ed] rates for the services provided to the [RespOrgs] that reasonably reflect their cost of service." Tariff Investigation II, 8 FCC Rcd. at 5137. The SMS/800 Tariff investigation is still ongoing.

33. DSMI was incorporated on April 29, 1993. Since May 1, 1993, DSMI has handled the day-to-day business management activities associated with the SMS/800. The SMS/800 database itself is administered by Southwestern Bell Telephone Company, one of the regional BOCs.

34. Despite the Bureau's investigation, the SMS/800 Tariff went into effect on May 1, 1993. Beehive was given its unique RespOrg identification number of BHV 01. In June 1993, DSMI began billing Beehive approximately \$7,500 a month for SMS services. Beehive promptly notified DSMI that it objected to the charges, and, in July 1993, DSMI threatened to terminate Beehive's access to the SMS/800.

35. In August 1993, Beehive informally complained to the Bureau about DSMI's exorbitant charges and, in October 1993, Beehive attempted to intervene in the Bureau's SMS/800 Tariff Investigation. However, in November 1993, the Bureau dismissed Beehive from the tariff investigation proceeding on the grounds that Beehive's allegations were appropriate for the FCC's formal complaint process. See 800 Data Base Access Tariffs

and the 800 Service Management System Tariff, 8 FCC Rcd. at 8176.

36. The SMS/800 Tariff provides for good faith negotiations to resolve billing disputes. Nevertheless, DSMI refused to negotiate a settlement of the dispute with Beehive. When the Bureau staff would not intercede, Beehive paid Bellcore \$42,768.90 under protest in December 1993. In March 1994, Beehive made its final (to that point) payment to DSMI. DSMI suspended its SMS/800 service to Beehive on April 26, 1994, alleging non-payment of charges.

37. In March 1994, Beehive filed its formal complaint against the BOCs with the FCC. In addition to the issues cited in paragraph 27 above, Beehive challenged the holding of CompTel Declaratory Ruling, and it argued that the ruling was invalid under the federal Administrative Procedures Act.

38. On August 16, 1995, the FCC issued its ruling on Beehive's formal complaint. The FCC ruled against Beehive on all issues. On September 15, 1995, Beehive timely filed its notice of appeal, on all of the issues stated above, with the D.C. Circuit Court of Appeals.

39. The proceeding before the D.C. Circuit Court of Appeals has gone forward, and oral argument was scheduled for September 9, 1996. On April 5, 1996, the FCC filed a motion with the Court of Appeals asking that the case be remanded to the FCC for further proceedings.

40. On February 8, 1996, Congress enacted the Telecommunications Act of 1996 ("1996 Act" or "1996 Telecommunications Act") to provide for a pro-competitive,

deregulatory policy framework for telecommunications, to which DSMI, as the agent of the BOCs, as well as the SMS/800 Tariff, are now subject.

41. On March 6, 1996, knowing that Beehive's appeal regarding the legality of the SMS/800 Tariff and the lawfulness of the charges thereunder was proceeding before the D.C. Circuit Court of Appeals, DSMI filed its suit in this case to collect payment of monies allegedly owed by Beehive under the SMS/800 Tariff.

42. Beehive responded by filing a Motion to Dismiss or in the Alternative to Stay the Action pending a resolution of the legal issues by the D.C. Circuit Court of Appeals. No decision has issued on that Motion, and by Stipulation the parties had agreed that Beehive would file its rebuttal memorandum to that of DSMI on June 7, 1996. The initial pretrial conference was scheduled before Magistrate Alba on June 24, 1996.

43. Although DSMI suspended Beehive in April 1994, Beehive still had the use of the 10,000 "800" numbers it had been issued, and DSMI had done nothing to deprive Beehive of the use of these numbers. Thus, the status quo between the parties was maintained.

44. Because the Beehive system can operate independently of the SMS/800 system and database, Beehive could continue to make use of the 629-xxxx numbers it had historically been authorized to use and bypass the SMS/800 system. These numbers have been used by Beehive's customers and by Beehive itself in a variety of uses, including without limitation for various administrative, alarm, and maintenance functions upon which the 14 Beehive exchanges depend for their operational capability.



45. On May 20, 1996, Beehive filed comments in the FCC's rulemaking proceeding to implement the local competition provisions of the 1996 Telecommunications Act. Beehive argued that the 1996 Act disqualified DSMI from administering "800" numbers, and precluded the use of the SMS/800 Tariff to recover the costs of "800" number administration.

46. Beehive discovered on May 30, 1996, that DSMI had begun disconnecting and repossessing all "800" numbers assigned to Beehive. DSMI later informed Beehive that this disconnection and repossession process had begun at the instruction of the BOCs. This disconnection and repossession of numbers will not only destroy the ability of Beehive's customers to make use of them, but also threatens the operational capability of Beehive's entire telephone system.

47. Beehive operates exchanges in isolated parts of rural Utah, and the system extends from Beehive's main switch in Wendover, Utah, to exchanges in Box Elder, Toole, Juab, Millard, Garfield, Wayne, and Kane counties. A sister company in Nevada uses the Wendover switch and Beehive's "800" numbers in connection with Beehive Telephone Nevada's exchanges in Elko and White Pine counties. The disconnections and repossessions undertaken by DSMI, if unabated, will result in the reassignment of the 10,000 Beehive 629-xxxx numbers to the BOCs. The disconnections and repossessions will destroy contracts between Beehive and customers which are built around these numbers. It will destroy the good will value of these numbers to Beehive, including the substantial investment in time and money and effort which Beehive has made in the development of